STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

ASHLY DRAKE SMITH,

Defendant-Appellant.

Supreme Court No. 149357

Court of Appeals No. 312721

Wayne County Circuit Court No. 12-004553-FC

/

BRIEF ON APPEAL

Amicus Curiae, The Innocence Network

/

ORAL ARGUMENT NOT REQUESTED

Erin L. Toomey (P67691)
Ryan C. Watkins (P78536)
FOLEY & LARDNER LLP
One Detroit Center
500 Woodward Avenue, Suite 2700
Detroit, MI 48226-3489
313.234.7100 (T)
313.234.2800 (F)
etoomey@foley.com
rwatkins@foley.com
Attorneys for Amicus Curiae, The Innocence Network

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STATEMENT OF QUESTIONS INVOLVED

In its October 3, 2014 Order directing oral argument on whether to grant Defendant-Appellant Ashly Drake Smith's ("Smith") Application for Leave to Appeal, this Court instructed the parties to brief the issue of "whether the defendant was deprived of his right to the effective assistance of trial counsel."

In this brief in support of Smith's Application for Leave to Appeal, the Innocence Network, as amicus curiae, will focus on whether the failure to investigate and present alibi testimony constitutes the ineffective assistance of counsel.

Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

Amicus Curiae, Innocence Network, says "Yes."

AMICUS INTEREST

The Innocence Network is an international affiliation of more than 60 different organizations in 44 states and 11 countries dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions.[1] In 2013, the work of Innocence Network member organizations led to the exoneration of 31 people around the world. These innocent people served a combined 451 years behind bars for crimes they did not commit.

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[1] Innocence Network member organizations include: the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), Arizona Justice Project, Arizona Innocence Project, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Griffith University Innocence Project (Australia), Hawaii Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence and Justice Project at the University of New Mexico School of Law, Innocence Network UK, Innocence Project, Innocence Project Argentina (Argentina), Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, France Innocence Project, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project South Africa, Innocence Project of Texas, Irish Innocence Project at Griffith College, Israel Public Defender, Kentucky Innocence Project, Life After Innocence, Loyola Law School Project for the Innocent, Italy Innocence Project, Knoops' and Partners Innocence Project (Netherlands), University of Miami Law Innocence Clinic, Michigan Innocence Clinic, Michigan State Appellate Defender Office Wrongful Conviction Units, Mid-Atlantic Innocence Project, Midwest Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, New York Law School Post-Conviction Innocence Clinic, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project (State of Ohio), Ohio Innocence Project, Oklahoma Innocence Project, Osgoode Hall Innocence Project (Canada), Pennsylvania Innocence Project, Puerto Rico Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, West Virginia Innocence Project, Wisconsin Innocence Project, Witness to Innocence, and Wrongful Conviction Clinic (Indiana).

The Innocence Network has a strong professional interest in the determination of the issues presented in this case. The Innocence Network seeks to remedy wrongful convictions and prevent the continued incarceration of innocent individuals. Additionally, the Innocence Network works to ensure that the wrongfully convicted have meaningful access to judicial relief through, among other things, the right to effective assistance of counsel. As a result, the Innocence Network supports the relief requested by Smith and urges the Court to hold that the failure to investigate and present alibi witnesses is objectively unreasonable and results in substantial prejudice, and thus constitutes ineffective assistance of counsel.

SUMMARY OF ARGUMENT

The Innocence Network agrees with Smith that the failure of defense counsel to investigate and present alibi witness testimony in this case rose to the level of ineffective assistance of counsel, and likely resulted in the conviction of an innocent defendant.

The Sixth Amendment right to effective assistance of counsel is one of the most basic and fundamental constitutional rights afforded to our citizens. In *Strickland v Washington*, the United States Supreme Court established the standard by which a court determines whether a defendant's right to effective assistance of counsel was violated. If a defendant shows that (1) counsel's representation fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense, then counsel was ineffective. Both prongs are met in this case.

Smith's trial counsel failed to take the necessary steps to develop an exculpatory alibi defense through comprehensive preparation and advance investigation into alibi witnesses. Without proper pre-trial investigation into an alibi defense and witnesses, defense counsel is unable to meaningfully develop a strategy for use of the alibi defense at trial. Where, as here, defense counsel fails to file a notice of alibi, fails to investigate alibi witnesses, and fails to present an available alibi defense, a defendant is left without the ability to effectively respond to the prosecution's case against him. This unreasonable conduct falls well below the standards for defense counsel in the State of Michigan, and can result in the conviction of innocent individuals for crimes they did not commit.

The systemic failure of defense counsel to properly investigate alibi defenses and present them at trial has led to wrongful convictions. Numerous innocent defendants have had their

convictions overturned after ineffective defense counsel failed to investigate and present alibi testimony or other crucial witnesses. For example:

- **Cory Credell** – In 2011, the District Court for the District of South Carolina granted habeas relief to Cory Credell. In 2001, Mr. Credell was convicted of murder and robbery. At his trial, he was appointed counsel with no previous experience in the criminal arena. Due to her ignorance of basic criminal and evidentiary law, defense counsel presented evidence of Mr. Credell's past criminal history on his direct examination, and failed to subpoena any potential alibi witnesses on his behalf. The Court found that defense counsel's failure to subpoena the alibi witnesses constituted "professionally deficient performance" and that her actions in eliciting past bad act evidence from the defendant were prejudicial. *See Credell v Bodison*, 818 F Supp 2d 928 (DSC 2011). As a result of the finding of ineffective assistance of counsel, Mr. Credell was exonerated in 2012 after serving over 10 years in prison.

- **Armando Ortiz** – In 2007, the Superior Court of California found that, as a result of his defense counsel's ineffective assistance, Armando Ortiz was wrongfully convicted of robbery and murder, and sentenced to two concurrent sentences of life without parole plus another 22 years. The Northern California Innocence Project assisted in demonstrating that Mr. Ortiz's defense counsel failed to investigate and introduce testimony of nine alibi witnesses at trial. Defense counsel ignored information concerning alibi witnesses and did not read the witness file closely enough to locate past witness statements. The Court held, in the face of a weak prosecution case, Mr. Ortiz was prejudiced by his defense counsel's unreasonable investigation into his alibi defense. The Court reversed Mr. Ortiz's convictions. *See In re Armando Ortiz*, No. 07CRWR678407 (Cal Sup Ct, Nov 14, 2007) (*see* the attached Appendix of Unpublished Cases). The prosecution dismissed the charges in June 2008.

- **Stephen Schulz** – In 2007, the District Court for the Eastern District of New York granted the habeas petition of Stephen Schulz. Mr. Schulz was convicted of robbery eight years prior to the grant of his petition based on the identification testimony of a single eyewitness. At trial, Mr. Schulz's defense counsel failed to cross-examine the eyewitness and failed to call an alibi witness who would have testified that the defendant was with him at the time of the robbery. The Court concluded that, given the extraordinarily weak evidence against Mr. Schulz, defense counsel's performance fell below the *Strickland* standard and resulted in undeniable prejudice *See Schulz v Marshall*, 528 F Supp 2d 77 (EDNY 2007), aff'd, 345 Fed App'x 627 (CA 2, 2009). Mr. Schultz was exonerated in 2009 after serving 10 years of his 11 year sentence.

Here, Smith suffered from the same type of ineffective assistance of counsel as the cases described above. As with Schulz, Smith's case is especially egregious where the sole evidence

against him is eyewitness identification testimony. When compared to other ineffective assistance cases of this nature, it is clear that Smith's Sixth Amendment right to counsel was violated.

This Court must ensure that a defendant's constitutional right to effective assistance of counsel is protected, and that counsel appointed to represent those defendants take reasonable steps to support a defendant's credible defense. The Innocence Network thus joins Smith in requesting that this Court grant his application for appeal and find that defense counsel in this matter was objectively unreasonable in her actions, resulting in substantial prejudice to Smith and violating his Sixth Amendment right to effective assistance of counsel.

STATEMENT OF RELEVANT PROCEEDINGS AND FACTS

The factual and procedural background of this case is set forth in Smith's Brief on Appeal, pp 2-14. In brief, Smith was charged and convicted of five offenses, including armed robbery, first degree home invasion, larceny in a building, possession of a firearm by a felon, and felony-firearm. These convictions resulted in four concurrent prison terms and one consecutive prison term, for a total sentence of 15-22 years.

The complainant, Shawn Kelly ("Kelly"), accused Smith of robbing him in his apartment. Kelly alleged that Smith had a handgun, ordered him to lie face down on the ground, then stole several valuable items. Though Kelly was not able to identify Smith initially, he thought he recognized him as "someone he had seen around the neighborhood," and used Facebook to learn his name. Kelly then posted a racially disparaging comment on his Facebook page about the alleged robber for being of mixed-race heritage. Kelly later contacted the police and identified Smith as the robber. Two months later, the police arrested Smith for the robbery, but did not recover the stolen items or any weapons. The only evidence against Smith was the sole eyewitness testimony of Kelly.

On May 21, 2012, the Court appointed attorney Susan Reed to represent Smith at trial. She did not meet with Smith in advance of trial except to engage with him in the bullpen of the Court during the pre-trial conference and in the Wayne County Jail on the eve of trial. Defense counsel requested that an investigator be appointed because she had a "list of witnesses that [needed] to be interviewed and possibly subpoenaed for trial." Defense counsel did not file a notice of alibi.

Defense counsel met Smith's alibi witnesses on the day of the trial. The alibi witnesses included Timothy Mulroy, Smith's roommate, and Melissa Mulroy and Sarah Urban, Smith's

neighbors. All three alibi witnesses confirmed that Smith was sick with the flu the night of the robbery, and that Smith split his time between his own apartment and the apartment of Melissa Mulroy and Sarah Urban that evening. Defense counsel determined before trial that if she called any of the alibi witnesses it would be Timothy Mulroy. Smith and Sarah Urban stated that defense counsel chose Timothy Mulroy because he was dressed more nicely than the others.

At trial, the prosecution relied exclusively on Kelly's identification of Smith as the robber. Defense counsel did not discuss Smith's alibi in her opening statement or closing argument, and did not call any of the alibi witnesses.[2] When later questioned about this decision, defense counsel claimed that she was concerned about the alibi witnesses presenting inconsistent testimony. At trial, defense counsel relied solely on the defense that Kelly's identification of Smith as the robber was a result of his racial bias against Smith. Sitting as the factfinder, the Court found Smith guilty as charged.

Smith appealed as of right to the Court of Appeals, claiming ineffective assistance of counsel for his attorney's failure to adequately investigate or present his alibi defense. The Court of Appeals remanded the case to the trial court for a *Ginther* hearing, focusing on the claim of ineffective assistance of counsel. At the hearing, several relevant facts were set forth:

- Defense counsel did not meet with Smith at the Wayne County Jail until the night before trial.
- Defense counsel was not certain whether the investigator had done anything with the alibi witnesses beyond serving witness subpoenas.

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[2] At the close of the prosecutor's case-in-chief, defense counsel stated for the record that "I have subpoenaed witnesses on my client's behalf, but after the way the testimony has gone . . . and further discussion with my client I am not going to call the witness." Smith answered affirmatively when asked, "Is that okay with you[?]" Smith later stated that he "just went along" with defense counsel's professional opinion.

- Defense counsel did not file an alibi notice or witness list.
- Defense counsel may have briefly conversed with one of the alibi witnesses before trial, but neither she nor the witness were certain whether the conversation occurred. Counsel spoke to the remaining alibi witnesses on the day of trial.
- All alibi witnesses were present the day of trial.
- Defense counsel decided that if she pursued an alibi defense, she would only call Mr. Mulroy, allegedly based solely on his appearance.
- Defense counsel did not call any alibi witnesses.
- Defense counsel may have spoken with Smith about foregoing the alibi defense, but she was not sure if it was a long conversation or if an off-record discussion took place.
- Defense counsel did not mention the alibi defense during the pre-trial conference or during opening statements. She did tell the prosecuting attorney about the alibi witnesses, who indicated that he would not object to her presentation of an alibi defense without notice.

The trial court found that defense counsel's decision not to present an alibi defense was strategic based on the alibi witnesses' inability to account for Smith for the entire time period at issue in the case and potential inconsistencies in the alibi witness testimony.

The Court of Appeals affirmed in a divided opinion. The majority held that defense counsel conducted a sufficient investigation by subpoenaing Smith's alibi witnesses and interviewing them on the date of trial. The dissent found the Smith should be granted a new trial because defense counsel's "decision not to consult with defendant until the eve of trial, her neglect to file an alibi defense, and her failure to interview the alibi witnesses until the day of trial, were objectively unreasonable and deprived defendant of a substantial defense."

On May 27, 2014, Smith asked this Honorable Court to grant his application for leave to appeal on the issue of whether he was deprived of his right to the effective assistance of counsel. On October 3, 2014, this Court directed oral argument on the issue of whether to grant Smith's application or take other action.

ARGUMENT

I. Standard of Review

The Court's review of ineffective assistance of counsel claims necessitates asking mixed questions of fact and law. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court applies a de novo review to legal conclusions, but reviews factual findings for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

II. The Failure To Properly Investigate And Present Alibi Witnesses Constitutes Ineffective Assistance Of Counsel

It is each defendant's constitutional right to have effective counsel present a meaningful defense. Appropriate advance investigation into such a defense – especially as it relates to potential alibi witnesses – is essential to the development of a defense strategy for use at trial. In *Strickland v Washington*, the Supreme Court established a two-pronged test for determining whether a defendant's Sixth Amendment right to the effective assistance of counsel has been violated. A defendant must show (a) "that counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms," and (b) "that the deficient performance prejudiced the defense." [3] *Strickland,* 466 US at 687-88. When defense counsel fails to properly investigate and present alibi witness testimony in support of the defendant's case, courts generally find that the *Strickland* prongs are met and that defendant has suffered from ineffective assistance of counsel.

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[3] The Michigan Supreme Court adopted the *Strickland* analysis in *People v Pickens*, 446 Mich 298, 521 NW2d 797 (1994).

A. The Failure To Properly Investigate And Present Alibi Witnesses Is Objectively Unreasonable.

Relevant to the underlying matter, there are three bases where courts have consistently found objective unreasonableness: (1) when defense counsel fails to file an alibi notice; (2) when defense counsel fails to adequately investigate alibi witnesses prior to trial; and/or (3) when defense counsel fails to present available alibi testimony as part of the trial defense. A defense counsel's failure on any – or a combination of – these grounds should satisfy *Strickland*'s first prong of the ineffective assistance of counsel test.

1. Reasonable Defense Counsel Would File A Statutorily Required Notice Of Alibi Defense Upon Learning Of Alibi Witnesses.

A defendant is extraordinarily prejudiced by a defense counsel's failure to file a notice of alibi in advance of trial. "Reasonable attorneys understand the importance of potential alibi defenses and that criminal defendants suffer prejudice whenever their attorneys overlook or forfeit such a defense." *Harrison v Cunningham*, 512 Fed App'x 40, 42 (CA 2, 2013) (*see* the attached Appendix of Unpublished Cases).

Upon learning from her client that an alibi defense or alibi witness potentially exists, reasonable defense counsel must file a notice of alibi defense. In fact, filing a notice of alibi defense is statutorily required under Michigan law. *See* MCL 768.20. The failure to timely file a notice of alibi defense when defense counsel is aware (or should be aware) of potential alibi testimony is considered inexcusable neglect and below the professional norm. *People v Pickens*, 446 Mich 298, 521 NW2d 797 (1994) (finding that defense counsel's failure to properly file notice of an alibi was inexcusable neglect where counsel was aware of potential alibi testimony nearly three months before trial); *Blackburn v Foltz*, 828 F2d 1177 (CA 6, 1987) (finding that defense counsel's performance was deficient where client provided three names of potential alibi witnesses and counsel did not file a notice of alibi defense). Failure to abide by the unequivocal

statutory requirements of the notice of alibi falls below the objective standard of performance. *See, e.g., Stewart v Wolfenbarger*, 468 F3d 338 (CA 6, 2006) (failure to provide the location of the alibi in notice of alibi); *Harrison*, 512 Fed Appx 40 (failure to file notice of alibi with the prosecution). Where alibi is a critical aspect of a defense, "there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the defense" and where there would have been "nothing to lose, yet everything to gain" by filing the notice. *Clinkscale v Carter*, 375 F3d 430 (CA 6, 2004).

As is shown in these cases, filing a notice of alibi defense allows defense counsel to ensure that the alibi defense is permitted to be heard at trial, resulting in a fair adjudication of defendant's case. Such an oversight is particularly egregious where the ability to present an alibi defense may be the only way to prevent conviction of an innocent defendant. This Court should thus find that defense counsel is absolutely required to file a notice of alibi defense upon learning about alibi witnesses. To fail to do so is patently unreasonable and is likely to prejudice a defendant.

2. Reasonable Defense Counsel Would Properly Investigate Alibi Witnesses.

If defense counsel fails to meet with alibi witnesses in advance of trial, she fails to give herself enough time to develop an effective defense strategy. As such, reasonable defense counsel must meet with her client as soon as feasibly possible in order to learn about any potential alibi defense and alibi witnesses. Upon learning about alibi witnesses, defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 691. "To make a reasoned judgment about whether evidence is worth presenting, one must know what it says." *Couch v*

Booker, 632 F3d 241, 246 (CA 6, 2011). A lawyer cannot make a protected strategic decision without investigating the potential bases for it. *Id.* (*citing Strickland*, 466 US at 690-91).

It is not necessary that there be *no* investigation by defense counsel in order for *Strickland* to be violated. In fact, a conclusion that defense counsel was effective simply because she performed *some* investigation is inappropriate and contrary to law. *See Stitts v Wilson*, 713 F3d 887, 892-93 (CA 7, 2013) (finding that trial counsel's investigation of potential alibi defense was insufficient under the *Strickland* test). As such, even where defense counsel took some affirmative steps toward investigating an alibi defense, she can be found to have acted unreasonably. *See, e.g., Blackburn*, 828 F2d at 1183 (though counsel made one trip to the location of the incident in order to investigate possible defenses, his failure to investigate a known and potentially important alibi witness constituted ineffective representation; he did not "attempt to investigate the known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary").

In *Avery v Prelesnik*, 548 F3d 434 (CA 6, 2008), the Sixth Circuit affirmed the Western District of Michigan's grant of habeas where defense counsel's investigation into defendant's alibi witnesses was inadequate. Counsel's investigator located and interviewed one potential alibi witness and left his business card with a request that the other potential alibi witness contact him. *Id.* at 437. Counsel instructed his investigator to follow up by telephone and in person in an attempt to contact these witnesses, but ultimately failed to contact the witness identified by defendant. *Id.* The Court found that defense counsel had an "obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Id.* (*quoting Wolfenbarger*, 468 F3d 338, 356 (CA 6, 2006)). Defense counsel's self-imposed

limitations on his investigation into the alibi witnesses made it impossible for him to have made "a strategic choice" not to have the witnesses testify. *Id.* at 438.

Similarly, in *Lord v Wood*, 184 F3d 1083 (CA 9, 1999), defense counsel conducted only a cursory investigation into three possible alibi witnesses, and subsequently failed to put them on the stand. Counsel relied only on the police reports characterizing the witnesses' statements, and did not interview the witnesses. *Id.* at 1093. Counsel claimed that he did not interview or elicit the testimony of the alibi witnesses because their statements to the police allegedly were vague and inaccurate. *Id.* The Ninth Circuit found that, "[t]hough the boys had slightly inconsistent recollections of the sighting, all of the discrepancies were minor and turned on the kind of highly specific details that eyewitnesses often remember differently" (i.e., what a person was wearing). *Id.* at 1094. Defense counsel's failure to conduct any individualized interview of the witnesses was thus unreasonable.

In *People v Johnson*, defendant was charged with second-degree murder for a shooting outside of a tavern in Pontiac, Michigan. 451 Mich 115, 117, 545 NW2d 637 (1996). Upon review of defendant's claim of ineffective assistance of counsel, the Michigan Supreme Court held that trial counsel was ineffective where he failed to investigate or call upon six supporting witnesses who would have corroborated defendant's father's testimony and the tavern owner's testimony that defendant was not the shooter. *Id.* at 122. Defense counsel stated that he had spoken with two or three of the six witnesses, and had little to no recollection of what they said. *Id.* at 123. That such cumulative exculpatory evidence was not thoroughly investigated or presented to the jury constituted deficient performance by the attorney. *Id.* at 122. Defense counsel's later inability to explain his decision not to investigate or present the alibi witnesses led the court to believe his choice was not strategic in nature. *Id.* at 124; *see also Bigelow v*

Haviland, 576 F3d 284 (CA 6, 2009) (finding that counsel had no reasonable explanation for failing to learn more about potential alibi witnesses; failure to take even minimal steps to corroborate defendant's alibi was objectively unreasonable); *Workman v Tate*, 957 F2d 1339, 1345 (CA 6, 1992) (holding that defense counsel's failure to interview or call witnesses amounted to unreasonable investigation; where counsel "has no reason to believe they would not be valuable in securing [defendant's] release, counsel's inaction constitutes negligence not trial strategy"); *Grooms v Solem*, 923 F2d 88, 90 (CA 8, 1991) (finding that, once a defendant identifies potential alibi witnesses, it is unreasonable for counsel not to make any effort to contact them to ascertain whether their testimony would aid the defense); *Bell v Georgia*, 554 F2d 1360, 1361 (CA 5, 1977) (finding defense counsel constitutionally deficient where defendant's sole defense at trial was his alibi that he was out of state on the day of the robbery and counsel did not make any effort to contact alibi witnesses or conduct any independent investigation).

It is impossible for defense counsel to adequately prepare for trial without conducting an adequate investigation of possible defenses. At times, an innocent defendant's only defense is his alibi, and he must rely on alibi witnesses to corroborate his testimony. At the very least, proper investigation into an alibi must include the defense counsel actually speaking to potential alibi witnesses prior to trial with enough time to develop a defense strategy. Thus, to completely fail to investigate alibi witnesses in advance of trial is unreasonable on its face.

3. Reasonable Defense Counsel Would Present Witnesses Who Corroborate A Defendant's Alibi

When witnesses are available and corroborate a defendant's alibi defense, reasonable defense counsel would present such witnesses at trial. "A lawyer who fails . . . to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient

doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Lord*, 184 F3d at 1093 (alteration in original) (internal quotation omitted). Importantly, "[a] tactical decision to pursue one defense does not excuse failure to present another defense that would bolster rather than detract from the primary defense." *Dugas v Coplan*, 428 F3d 317, 331 (CA 1, 2005) (internal quotation omitted).

Courts often find that defense counsel's failure to present alibi witnesses in the face of a weak case against a defendant is particularly unreasonable and constitutes ineffective assistance of counsel. *See, e.g., Avery*, 548 F3d at 439 ("*Strickland* instructs that 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' Thus, the availability of willing alibi witnesses must also be considered in light of the otherwise flimsy evidence supporting [defendant's] conviction."); *Lord*, 184 F3d at 1094 ("defense counsel's failure to present the alibi testimony was even more questionable in light of the prosecution's weak case"). This is especially true when the prosecution relies solely on the complainant's identification testimony. *See, e.g., Stitts v Wilson*, 713 F3d 887, 892-93 (CA 7, 2013) (if alibi witnesses had been presented, "the trial would have been transformed from a one-sided presentation of the prosecution's case into a battle between competing eyewitness testimony"); *cf. Henry v Poole*, 409 F3d 48, 66 (CA 2, 2005) (where the only evidence presented to the jury to connect defendant to the robbery was the complainant's identification testimony, and where defendant had a strong defense of misidentification, defense counsel's presentation of false alibi evidence constituted ineffective assistance of counsel).

The existence of an alibi defense is futile if it is not presented at trial. If an alibi is found to be credible (after proper investigation) and corroborates defendant's story, reasonable defense counsel would present the alibi at trial, especially in the face of a weak prosecution and/or sole identification testimony. To fail to present an alibi defense in that scenario deprives the defendant of his constitutional right to effective assistance of counsel.

B. The Failure To Properly Investigate And Present Alibi Witnesses Results In Prejudice To The Defendant.

Innocent defendants are undeniably prejudiced by a defense counsel's failure to present a properly investigated alibi defense. Under *Strickland*, prejudice is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 US at 694. Prejudice is commonly found when the prosecution's case is particularly weak or, like here, the prosecution relies on sole eyewitness testimony or similar, readily-disputed evidence.

The failure to properly investigate or present an alibi defense in the face of uncorroborated eyewitness identification evidence undermines confidence in the outcome of the case. *Griffin v Warden*, 970 F2d 1355, 1359 (CA 4, 1992). Such evidence is "precisely the sort of evidence that an alibi defense refutes the best." *Id.*; *see also Stitts*, 713 F3d at 894 (defense counsel's presentation of alibi witnesses in the face of the prosecution's eyewitness testimony would have led to a "reasonable probability that a jury would have reasonable doubt as to defendant's guilt"); *Henry*, 409 F3d at 66 (failure to present proper alibi evidence in the face of complainant's identification testimony prejudiced defendant and led the court to lack confidence in the result of the trial); *Clinkscale*, 375 F3d at 444-45 (defense counsel's failure to elicit alibi

witness testimony resulted in prejudice to defendant where prosecutor relied on sole eyewitness testimony and there were "notable weaknesses" in the prosecution's case).

Presentation of an alibi defense at trial is often an innocent defendant's only path to justice and freedom. Particularly, in the face of sole identification testimony, there is a reasonable possibility that the presentation of alibi witnesses can completely alter the outcome of the trial. As a result, when defense counsel unreasonably fails to adequately provide notice, investigate and/or present an available alibi defense in the face of weak prosecution evidence, the defendant is prejudiced. Under such circumstances, this Court should find that a defendant is denied his constitutional right to effective assistance of counsel.

III. Public Policy Demands That Defense Counsel Must Reasonably Investigate And Present Alibi Defenses, Especially In The Face Of Identification Evidence

The constitutional requirement of effective assistance of counsel demands that defense counsel reasonably investigate all available defenses, including alibi defenses. As discussed above, this is especially critical when the prosecution relies on identification evidence in its case against a defendant.

Erroneous witness identification has been found repeatedly to be a leading cause of wrongful conviction. *See* C. Ronald Huff, Martin Killas Routledge, Wrongful Convictions: Causes and Remedies in North American and European Criminal Justice Systems, 27 (2013). One study has found that as many as seventy-nine percent of proven wrongful conviction cases involving DNA evidence have involved mistaken witness identification. *See* Jules Epstein, Controversies in Innocence Cases in America, 41 (2014) ("A starting point for asserting the dimensions of this problem is found in the retrospective analysis of proved wrongful convictions – time and time again, those are found to have been caused by eyewitness error in roughly half to as many as 79 percent of the studied cases.") (*citing* Brandon Garrett, Judging

Innocence, 108 Colum. L. Rev. 55, 78 (2008) ("[T]he overwhelming number of convictions of the innocent involved eyewitness identification – 158 of 200 cases (79%)")). Professor Epstein has postulated that even with an error rate of one-half of one percent, with an estimated 80,000 prosecutions in the United States a year based on eyewitness testimony, there are 400 wrongful convictions annually. *Id.* at 42.

With flawed witness identifications resulting in so many wrongful convictions, our adversarial system only functions if both the prosecution and defense conduct a reasonable investigation into the facts of each case. Lowering a defense counsel's duty to investigate will unconstitutionally disadvantage defendants and rob them of their Sixth Amendment right to effective assistance of counsel. *See Strickland*, 466 US at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."). A choice not to investigate each and every defense that would combat witness identification evidence is only reasonable "to the extent that reasonable professional judgments support the limitations on investigation." *Id.* With such a high percentage of erroneous identifications, defense counsel should be required to meaningfully investigate available alibi witnesses in an attempt to circumvent the possibility of wrongful conviction.

Failure to uphold the requirements of effective assistance of counsel, particularly as they relate to reasonable investigation, will lead to situations where legitimate defenses are unexplored thereby resulting in increased wrongful convictions. For these reasons, defense counsel must be held to the duty to reasonably investigate and present an alibi defense when available, thus ensuring the effective assistance of counsel for all defendants.

CONCLUSION

For all the above-stated reasons, the Innocence Network, as amicus curiae, respectfully requests that this Court grant Smith's application for leave to appeal and hold that the failure to properly investigate and present alibi witnesses constitutes ineffective assistance of counsel and deprives defendants of their right to counsel.

Respectfully submitted,

Erin L. Toomey (P67691)
Ryan C. Watkins (P78536)
FOLEY & LARDNER LLP
One Detroit Center
500 Woodward Avenue, Suite 2700
Detroit, MI 48226-3489
313.234.7100 (T)
313.234.2800 (F)
etoomey@foley.com
rwatkins@foley.com
Attorneys for Amicus Curiae,
The Innocence Network

Dated: December 4, 2014

APPENDIX OF UNPUBLISHED CASES

R07CRWR678407.GDH:snf

FILED
NOV 14 2007
FRESNO SUPERIOR COURT
By _____ DEPT. 71 - DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

In re ARMANDO ORTIZ, Petitioner, On Habeas Corpus.	)	No. 07CRWR678407 Dept. 71
	)	ORDER

Armando Ortiz (hereinafter "Petitioner") has filed a petition for Writ of Habeas Corpus alleging that he received ineffective assistance of counsel at trial because counsel failed to investigate or present multiple alibi witnesses.

On August 14, 2007 the Court issued an order to show cause, tentatively setting the hearing on November 7, 2007. The People of the State of California, through both the Attorney General and the District Attorney ("Respondents"), have failed to file a return to this Court's Order to Show Cause or appear at the noticed hearing.

Respondents having not filed a return, the Petitioner has not filed a denial. Petitioner did file supplemental evidence in support of the Petition on July 23, 2007 and filed a motion to

grant the Petition based on the lack of a return from the Respondents.

In order to make a prima facie case for habeas relief based on ineffective assistance of counsel, a petitioner must show that his counsel's representation fell below an objective standard of reasonableness, and that the errors caused prejudice to his case (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 693). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at 694.)

Petitioner has shown that his trial counsel, Ernest Kinney, failed to introduce testimony of nine alibi witnesses at trial. Mr. Kinney's declaration sets forth that he did not recall any information or reports of alibi witnesses or that the petitioner ever told him of about the witnesses. As court appointed counsel, Mr. Kinney received money from the court for investigation costs, but conceded that he did not spend the money because he did not need to do an investigation since had no information about alibi witnesses. Mr. Kinney returned to the court the money received for investigation purposes. Mr. Kinney's trial tactics were centered on third party culpability and the lack of any physical evidence connecting the petitioner to the charged offenses.

Petitioner's former attorney and his investigator interviewed the alibi witnesses and obtained statements from them. The former attorney has declared that he informed Mr. Kinney of

the witnesses and that the reports of the witnesses' statements were in the case file which was provided to Mr. Kinney. Petitioner has declared that he informed Mr. Kinney of the witnesses. The appellate attorney's office found the witness statements in the case file which was received from Mr. Kinney.

It appears Mr. Kinney either ignored the information concerning alibi witnesses and/or he overlooked or did not thoroughly read the file and locate the witness statements.

The Court finds that failure to investigate the alibi witness statements and the failure to call the witnesses at trial was probably prejudicial to Petitioner's case. The prosecution's case at trial was relatively weak. There was no physical evidence that tended to link the petitioner to the crime and no eyewitnesses who testified that the petitioner was present at the scene on the night of the murder. The primary evidence against the petitioner at trial was his drunken, incoherent "confession" to his mother and one other person, however the statement was vague and full of inconsistencies. The presentation of the alibi witnesses would not have been inconsistent with the defense argument at trial and, in fact, would have supported the defense trial strategy.

Therefore, the Court finds that under the circumstances the trial counsel's failure to obtain and present the alibi witnesses' testimonies constituted ineffective assistance of counsel. Counsel's failure to conduct an investigation, to discover the alibi witness statements and to present alibi witness testimony was objectively unreasonable. Further, the Court finds that the ineffective assistance of counsel, under the totality of

the circumstances, supports a finding of prejudice since there is a reasonable probability that the jury would have reached a different result if the defense had presented the alibi witnesses at trial.

Accordingly, the Court orders:

1. The Northern California Innocence Project has been appointed to represent Petitioner, Armando Ortiz, from the date the Court entered its Order to Show Cause;

2. The Order to Show Cause re Habeas Corpus is discharged;

3. The Petition for Writ of Habeas Corpus is granted as to Counts One through Four of the Second Amended Information based upon the finding that ineffective assistance of trial counsel prejudiced petitioner's case;

4. Petitioner's convictions as to Counts One through Four and the related firearm enhancements in the underlying case *People v. Ortiz*, No. F02676293 are hereby reversed;

5. Petitioner's Petition for Writ of Habeas Corpus as to the conviction of all remaining counts of the Second Amended Information is denied.

6. Petitioner Armando Ortiz is remanded to the custody of the Fresno County Sheriff to be held pending retrial of the reversed counts.

Pursuant to Penal Code section 1382, subdivision (a)(2), the Fresno County District Attorney's Office has 60 days from the entry of this order within which to retry Petitioner on the Counts of the Second Amended Information that have been reversed pursuant to this writ.

IT IS SO ORDERED.

DATED this 14 day of November, 2007.

GARY D. HOFF
JUDGE OF THE SUPERIOR COURT

Harrison v. Cunningham

United States Court of Appeals for the Second Circuit

February 21, 2013, Decided

No. 11-2949-pr

Reporter
512 Fed. Appx. 40; 2013 U.S. App. LEXIS 3630; 2013 WL 627723

CHARLES HARRISON, Petitioner-Appellee, v. RAYMOND J. CUNNINGHAM, Respondent-Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the Eastern District of New York (Garaufis, J.). *Harrison v. Cunningham, 2011 U.S. Dist. LEXIS 67383 (E.D.N.Y., June 21, 2011)*

Core Terms

district court, witnesses

Case Summary

Procedural Posture

Appellant assistant district attorney (ADA) sought judicial review of the order by the United States District Court for the Eastern District of New York granting appellee state inmate's *28 U.S.C.S. § 2254* petition for a writ of habeas corpus. He alleged that his trial attorney provided ineffective assistance of counsel in violation of his rights under the *Sixth Amendment* because counsel failed to inform the prosecution of two alibi witnesses.

Overview

On appeal, the ADA argued that the district court erred when it held that the New York Appellate Division's denial of the inmate's claim involved an unreasonable application of clearly established federal law. The Appellate Division applied the Strickland test unreasonably when it concluded that the failure of the inmate's counsel to notify the prosecution of two alibi witnesses, which prevented those witnesses from testifying that hie was not at the scene of the crime, did not violate his rights under the *Sixth Amendment*. The ADA argued that the relevant attorney's representation did not fall below an objective standard of reasonableness because that attorney replaced another after the deadline for notifying the prosecution of alibi witnesses had expired. Trial counsel had nothing to lose, yet everything to gain, from filing a late notice of alibi, and no considerations of sound trial strategy even conceivably justified his decision not to do so. Contrary to the ADA's assertion, the inmate suffered prejudice. There was no colorable justification for the rejection of the inmate's *Sixth Amendment* argument.

Outcome

The judgment of the district court was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Habeas Corpus

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN1 An appellate court reviews de novo a district court's decision to grant a habeas petition. In so doing, an appellate court reviews a district court's factual findings for clear error.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > General Overview

HN2 Under the Antiterrorism and Effective Death Penalty Act, federal courts shall not grant habeas petitions unless a petitioner meets certain statutory requirements. *28 U.S.C.S. § 2254(d)*.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Clearly Established Federal Law

HN3 Clearly established federal law refers to the holdings, as opposed to the dicta, of the United States Supreme Court 's decisions as of the time of the relevant state-court decision.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

Evidence > Burdens of Proof > Allocation

HN4 A federal court may not find an unreasonable application of federal law merely because a state court has ruled erroneously or incorrectly. Rather, a habeas petitioner must show that the state court's ruling on the claim being presented was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. Where a state court gives no explanation beyond saying that the claim is without merit, a federal habeas court assumes the court relied on any reasonable ground that was available.

Criminal Law & Procedure > ... > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN5 To challenge his conviction based on the ineffectiveness of his trial counsel, a habeas petitioner must make two showings. First, he must show that his counsel's representation fell below an objective standard of reasonableness.

Criminal Law & Procedure > ... > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Evidence > Burdens of Proof > Allocation

HN6 A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and a habeas petitioner may overcome that presumption only by showing that his counsel's acts or omissions cannot be considered sound trial strategy.

Criminal Law & Procedure > ... > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN7 Second, a habeas petitioner asserting a claim of ineffective assistance of counsel must show prejudice, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Criminal Law & Procedure > ... > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > ... > Counsel > Effective Assistance of Counsel > Trials

HN8 Reasonable attorneys understand the importance of potential alibi defenses and that criminal defendants suffer prejudice whenever their attorneys overlook or forfeit such a defense.

Criminal Law & Procedure > Habeas Corpus > Appeals > General Overview

HN9 Even if a district court applies an incorrect standard in granting a habeas petition, an appellate court remains free to affirm based on its independent assessment of the case under the correct standard.

Criminal Law & Procedure > Trials > Witnesses > Credibility

HN10 In the absence of physical evidence tying a defendant to the crime, the proof in a case turns on each witness's credibility.

Counsel: For Petitioner-Appellee: RANDOLPH Z. VOLKELL, Merrick, NY.

For Respondent-Appellant: CRISTIN N. CONNELL, Assistant District Attorney, for Kathleen M. Rice, District Attorney, Nassau County, Mineola, NY.

Judges: Present: ROBERT A. KATZMANN, GERARD E. LYNCH, Circuit Judges, ROSLYNN R. MAUSKOPF, District Judge. *

Opinion

[*41] **SUMMARY ORDER**

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the judgment of the district court be and hereby is **AFFIRMED.**

Respondent-Appellant Raymond J. Cunningham appeals from a June 22, 2011 Order of the United States District Court for the Eastern District of New York (Garaufis, *J.*), which granted Petitioner-Appellee Charles Harrison's petition for a writ of habeas corpus under 28 U.S.C. § 2254. In his petition, Harrison argued that his trial attorney provided ineffective assistance of counsel in violation of Harrison's rights under the *Sixth Amendment*. *See generally Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Harrison based this [**2] argument on his trial attorney's failure to notify the prosecution of two alibi witnesses, which resulted in the exclusion of their testimony. The New York Appellate Division has previously rejected Harrison's *Sixth Amendment* argument. *People v. Harrison, 28 A.D.3d 581, 813 N.Y.S.2d 204, 205 (App. Div. 2006)*. On appeal, Cunningham argues that the district court erred when it held that the Appellate Division's decision "involved an unreasonable application of . . . clearly established Federal law." *28 U.S.C. § 2254(d)(1)*. We assume the parties' familiarity with the relevant facts, the procedural history, and the issues presented for review.

HN1 "We review de novo a district court's decision to grant . . . a habeas petition." *Hawkins v. Costello, 460 F.3d 238, 242 (2d Cir. 2006)*. "In so doing, we review a district court's factual findings for clear error." *Id.* ***HN2*** Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal courts "shall not" grant habeas petitions unless a petitioner meets certain statutory requirements. *28 U.S.C. § 2254(d)*. Here, the parties dispute whether the Appellate Division's rejection of Harrison's *Sixth Amendment* challenge "involved an unreasonable application of . . [**3] . clearly established Federal law." *Id. § 2254(d)(1)*. ***HN3*** "[C]learly established Federal law" refers "to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. ***HN4*** A federal court may not find an "unreasonable application" of federal law merely because a state court has ruled "erroneously or incorrectly." *Id. at 411*. Rather, a petitioner must show that "the state court's ruling on the claim being presented . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter, 131 S. Ct. 770, 786-87, 178 L. Ed. 2d 624 (2011)*. Where, as here, "the Appellate Division gave no explanation beyond saying that the claim was 'without merit,' we . . . must assume the court relied" on "any reasonable ground [that] was available." *Wade v. Herbert, 391 F.3d 135, 142 (2d Cir. 2004)*.

[*42] ***HN5*** To challenge his conviction based on the ineffectiveness of his trial counsel, Harrison must make two showings. First, he must show that his "counsel's representation fell below an objective standard of reasonableness." [**4] *Strickland, 466 U.S. at 688*. ***HN6*** "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and a petitioner may overcome that presumption only by showing that his counsel's acts or omissions cannot be "considered sound trial strategy." *Id. at 689* (internal quotation marks omitted). ***HN7*** Second, Harrison must show "prejudice," *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*. Courts applying *Strickland* to similar facts have held that ***HN8*** reasonable attorneys understand the importance of potential alibi defenses and that criminal defendants suffer prejudice whenever their attorneys overlook or forfeit such a defense. *See, e.g., Lindstadt v. Keane, 239 F.3d 191, 199-201 (2d Cir. 2001); see also Raygoza v. Hulick, 474 F.3d 958, 965 (7th Cir. 2007); cf. Clinkscale v. Carter, 375 F.3d 430, 443 (6th Cir. 2004)* (reviewing *de novo* because the state courts had not adjudicated the claim on the merits); *Lord v. Wood, 184 F.3d 1083, 1096 (9th Cir. 1999)* (applying pre-AEDPA standards).

We find that the Appellate Division applied [**5] *Strickland* unreasonably when it concluded that the failure of Harrison's counsel to notify the prosecution of two alibi witnesses—which prevented those witnesses from testifying that Harrison was not at the scene of the crime—did not

* The Honorable Roslynn R. Mauskopf, of the United States District Court for the Eastern District of New York, sitting by designation.

violate his rights under the *Sixth Amendment*. [1] Turning to the first prong of *Strickland*, Cunningham argues that the relevant attorney's representation did not fall below an "objective standard of reasonableness" because that attorney replaced another after the deadline for notifying the prosecution of alibi witnesses had expired. Because that deadline had expired, Cunningham concludes that Harrison's counsel had to choose between moving to file a late notice of alibi and seeking to admit the witnesses' testimony under another theory. Nowhere does Cunningham explain, however, why Harrison's counsel could not have pursued both courses of action. Lawyers frequently present seemingly inconsistent positions in the alternative. Indeed, on appeal, Harrison's attorney advanced both of the positions that his trial counsel felt compelled to choose between. Thus, Harrison's trial counsel had "nothing to lose, yet everything to gain, from filing the alibi notice," [**6] *Clinkscale, 375 F.3d at 443*, and no considerations of "sound trial strategy" even conceivably justified his decision not to do so. [2]

Turning to the second prong of *Strickland*, Cunningham [**7] argues that Harrison [*43] suffered no prejudice because the chief prosecution witness, namely, the arresting officer, gave detailed testimony implicating Harrison and asserted that there was "a hundred percent no doubt in [his] mind" that Harrison had committed the crime. App'x at 171. Notwithstanding the officer's confidence, however, ***HN10*** in the absence of physical evidence tying Harrison to the crime, the proof in this case turned on each witness's credibility. After Harrison testified that, at the relevant time, he was leaving a party with two friends, his credibility depended on the presentation of supporting testimony by the two friends to whom he had referred. His counsel's failures prevented the presentation of such testimony, thereby suggesting to the jury that his friends declined to support his story because it was false. Given the critical importance of the relevant testimony to the central issue before the jury, no court could justifiably find that there was not even a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, 466 U.S. at 694*; *cf. Henry v. Poole, 409 F.3d 48, 72 (2d Cir. 2005)* ("[I]t [**8] is 'axiomatic' that the presentation of false exculpatory evidence in general, and false alibi evidence in particular, is likely to be viewed by the jury as evincing consciousness of guilt." (citation omitted)). Having found no colorable justification for the rejection of Harrison's *Sixth Amendment* argument, we agree with the district court that the Appellate Division applied *Strickland* unreasonably.

We have considered Cunningham's remaining arguments and find them to be without merit. For the reasons stated herein, the judgment of the district court is **AFFIRMED.**

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[1] As a threshold matter, we reject Cunningham's argument that the district court failed to apply the standard required by AEDPA. The district court not only cited the correct standard, but also characterized the Appellate Division's decision as "unreasonable" with respect to each prong of the *Strickland* analysis. *Harrison v. Cunningham*, No. 07-CV-4077 (NGG), 2011 U.S. Dist. LEXIS 53263, 2011 WL 1897655, at *2, *5-*6 (E.D.N.Y. May 18, 2011). Moreover, ***HN9*** even if the district court had applied an incorrect standard, we would remain to free to affirm based on our independent assessment of the case under the correct standard. *See Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006).

[2] Nor can it be contended that seeking leave to file a late notice weeks in advance of trial would have been futile. New York courts have stated that "late entry of defense counsel into the case may provide the required reasonable excuse for delay in service of the notice of alibi." *See People v. Mensche*, 276 A.D.2d 834, 714 N.Y.S.2d 377, 380 (App. Div. 2000).